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No. 86-1108

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STATE OF VERMONT,

Petitioner,

v.

RICK COX,

Respondent.

On Writ of Certiorari to the Supreme Court of Vermont

REPLY BRIEF OF PETITIONER

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ARGUMENT

I. RESPONDENT'S SIXTH AMENDMENT RIGHT TO ASSISTANCE OF COUNSEL WAS NOT VIOLATED DURING THE PSI INTERVIEW; PRIOR NOTICE OF THE PSI INTERVIEW AND ITS PURPOSE SUFFICIENTLY PROTECTED RESPONDENT'S RIGHTS IN THE NON-ADVERSARIAL INTERVIEW.

A. The Court should decline consideration of this claim.

Petitioner first asserts that, in an exercise of its discretion, the Court should decline consideration of a claim which was not addressed by the state supreme court. The Vermont Supreme Court based its decision solely on

the Fifth Amendment.[1] This Court should not decide a claim not fully examined by the court below nor contained within the question accepted for review.

B. Prior notice gave respondent the opportunity to consult with counsel before the PSI interview.

Should the Court examine this issue, the Sixth Amendment claim is without merit since the respondent had received prior notice of the presentence investigation (PSI) interview and had had an opportunity to consult with counsel about the interview process and the use of his statements at the sentencing hearing. Respondent argues that, by calling for an investigator, he invoked his Sixth Amendment right to counsel at the interview.[2] By asserting the existence of the right and arguing the absence of a waiver on the record,[3] the respondent ignores the facts and the law which are relevant to a determination of the extent of his rights. Since the respondent had had a prior opportunity to receive assistance of counsel,

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[1] Pet. App. 1a-7a. While respondent's brief filed at the state supreme court argued that the information in the PSI report was obtained in violation of both his privilege against self-incrimination and right to counsel, the Vermont Supreme Court did not reach the latter claim. Pet. App. 2a.

[2] The petitioner does not concede that a request to speak with a defense *investigator* amounts to a request for assistance of counsel. Just as in *Connecticut v. Barrett*, —— U.S. ——, 107 S.Ct. 828, 832 (1987), interpretation of this remark is clear. Respondent had been through the criminal justice system; he knew the difference between an investigator and his attorney. "To conclude that respondent invoked his right to counsel . . . requires not a broad interpretation of an ambiguous statement, but a disregard of the ordinary meaning of respondent's statement." *Id.*

[3] Respondent's reliance on the waiver argument, discussed in *Michigan v. Jackson*, —— U.S. ——, 106 S.Ct. 1404 (1986), is misplaced. Respondent had already received the full extent of his right to counsel prior to the interview; at that point he had been afforded an opportunity to consult with counsel. He had no reason to waive that which he had already received.

his decision to go ahead without additional advice was a matter of choice and not a constitutional violation.

On December 9, 1983, at the change of plea hearing, the trial judge ordered the PSI report to assist the court at the upcoming sentencing hearing. J.A. 1.[4] Respondent and his counsel learned that, pursuant to 28 V.S.A. § 204 and V.R.Cr.P. 32,[5] a probation officer would interview Cox in preparation for the presentence report.

Defense counsel asserted at the sentencing hearing that her office

> in fact arranged for our investigator to go down and talk with him to *prepare* him for what would be coming forward . . . . [The probation officer] made him feel as though he would have no opportunity to consult with us *before* talking with her. So that much of the material which has been included . . . are things that our client would have been advised about had he had an opportunity to speak with us first. J.A. 15. (Emphasis added)

Defense counsel had exactly such an opportunity to prepare respondent for the meeting well before the actual interview, since prior notice of the PSI interview is uncontroverted.[6]

It is entirely appropriate that defense counsel bear the burden of explaining "the nature of the presentence

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[4] Consistent with Vermont practice, the PSI report was ordered in open court in the presence of the parties.

[5] *See* Pet. App. 10a, 16a-17a.

[6] The date of the PSI interview is not clear from the record. Following customary practice in Vermont, in the case of an incarcerated defendant, the probation department is notified by the court clerk that the judge has ordered a PSI. Following notification the report is assigned to a probation officer. The interview takes place at some later date. For additional discussion of the sequence of events surrounding the PSI interview, *see* Petitioner's Brief at 14 n. 12.

investigation process, and in particular the significance of statements made by the defendant to probation officer and related personnel." ABA Standards for Criminal Justice, Sentencing Alternatives and Procedures § 18-6.3(f)(ii)(C) (Vol. III 1980). Only a defense counsel can properly help a respondent shape his responses to avoid making a volunteered, incriminatory statement. This task is not and should not be the responsibility of the probation officer who cannot know which areas of discussion pose incriminatory risks for the respondent. In this context, the choice offered the respondent regarding his participation in the interview was legitimate; delaying interviews at the request of the respondent, who has had prior opportunity to consult with counsel, is unworkable.[7] The state legislature regulates the operations of the probation department and requires the prompt preparation and filing of PSI reports in part to prevent defendants awaiting sentencing from languishing in jail.

C. The nature of the PSI interview does not justify the extension of right to counsel beyond prior notice and an opportunity to consult with counsel.

Respondent now argues that the denial of his request to postpone the PSI interview violated his right to counsel since the PSI interview constitutes a critical stage. While the sentencing hearing is unquestionably a critical stage demanding the assistance of counsel, *Mempa v. Rhay*, 389 U.S. 128 (1967), the PSI interview is not. First, the PSI interview must be distinguished from the sentencing hearing itself. The interview is focused on the gathering of information for consideration by the sentencing judge. As this Court has noted, "a sentence is characteristically determined in large part on the basis of information,

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[7] Cf. *Gerstein v. Pugh*, 420 U.S. 103, 122 n. 23 (1975). The decision suggests that a constitutional doctrine requiring added procedures for all persons awaiting sentencing could exacerbate the problem of delay in sentencing.

such as the presentence report . . . . and much that goes into [the sentencing] is the result of inquiry that is non-adversary in nature." *United States v. DiFrancesco*, 449 U.S. 134, 136-37 (1980). The interview of a respondent by the probation officer is not a "trial-like confrontation," involving a procedural system or an expert adversary. Thus, the extension of the right to counsel to this phase of the proceedings is not justified. The PSI interview does not pose the same dangers that gave birth initially to the Sixth Amendment right. *United States v. Ash*, 413 U.S. 300, 311 (1972).

D. Under the Ash test, respondent's rights were not violated.

1. *Respondent did not need help coping with the legal system at the time of interview.*

The PSI interview does not satisfy the governing test, announced in *United States v. Ash*, 413 U.S. 300 (1972), for determining when the Sixth Amendment right to counsel applies. Simply put, to warrant an extension of the right to counsel, the accused must be "confronted, just as at trial, by the procedural system, or by his expert adversary, or by both." *Id.* at 310. In this case, the "procedural system" had already revealed to respondent and counsel the upcoming PSI interview. Respondent could have received the advice of counsel "in making the significant decision of whether to submit" to the PSI interview. *Estelle v. Smith*, 451 U.S. 454, 471 (1980). *See also United States ex rel. Bachman v. Hardy*, 637 F. Supp. 1273 (N.D. Ill. 1986).[8] Foreknowledge of a court-ordered sentencing examination gave defense counsel an opportunity to advise his client about whether to submit to the interview process and how to conduct himself. The respondent knew or should have known how to

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[8] While the court decided this point under a Fifth Amendment analysis, the same logic applies here.

cope with this interview since the interview and its purpose were not unexpected.

2. Respondent was not confronted by an expert adversary.

The second component of the test involves the presence of an expert adversary. The probation officer is not an expert adversary; the probation officer has the job of providing "the sentencing court with succinct and precise information upon which to base a rational sentencing decision . . ." *State v. Chambers*, 144 Vt. 377, 383, 477 A.2d 974, 978-79 (1984), quoting from *State v. Rathburn*, 140 Vt. 382, 388, 442 A.2d 452, 455 (1981). Respondent did not require "assistance in meeting his adversary," *United States v. Ash*, 413 U.S. at 313, since the PSI is merely "a 'routine' presentence interview . . . restricted to gathering information upon which the district court, in its discretion, may rely when imposing sentence." *Baumann v. United States*, 692 F.2d 565, 576 (9th Cir. 1982). *See also Brown v. Butler*, 811 F.2d 938, 941 (5th Cir. 1987) (the report is written by a neutral "arm of the court charged with assisting the Court in arriving at a fair sentence").

In *Estelle v. Smith*, *supra*, this Court found that a pre-trial psychiatric interview became a "critical stage" because of a lack of notice regarding the scope of the psychiatric examination and the future use of defendant's statements at the penalty phase of the proceeding. Both criteria of the critical stage test were present. Respondent was not assisted by counsel when he decided whether or not to submit to the examination. The examining psychiatrist became an adversary when the prosecution used the psychiatrist's conclusions, derived from the examination, to establish an essential element to the imposition of a capital sentence at the penalty phase of the case. *Id.* at 471.

The instant case differs in all significant respects. Here, Cox had "the guiding hand of counsel," *Powell v.*

Alabama, 287 U.S. 45, 69 (1932), or at least the opportunity to confer with counsel in advance of the interview. Respondent and his counsel understood the potentially far-ranging scope of the interview and its role at sentencing. Unlike *Estelle* where the *use* of defendant's statements established a critical element of proof at the penalty phase, at the PSI interview the entire PSI, including respondent's comments, and the conclusions of the probation officer are non-binding recommendations. "It was not part of the investigative and identification process, preceding arrest, aimed at ferreting out the guilty, suffused with the risk of police abuse and the possibility of implicating the innocent." *United States v. Baird*, 414 F.2d 700, 711-12 (2nd Cir. 1969). As a neutral arm of the criminal justice system, the probation officer may recommend a sentence to be served or alternatives to incarceration such as a fine and/or probation, a deferred sentence or community service. The officer is not simply another voice of the prosecution. *See also Griffin v. Wisconsin*, —— U.S. ——, ——, 107 S.Ct. 3164, 3169 (1987) (in light of his function the probation officer is not considered a police officer).

3. *Even if the PSI interview was deemed a "critical stage," there is no* per se *Sixth Amendment violation.*

Any purported infringement of respondent's right to counsel is dispelled since "the subsequent trial would cure a one-sided confrontation between prosecuting authorities and the uncounseled defendant." *United States v. Ash*, 413 U.S. at 315. Under federal and state rules of criminal procedure, the defense could examine the relevant portions of the PSI report, i.e., those parts containing the respondent's own statements, in advance of the sentencing hearing to determine its accuracy and truthfulness. As the hearing, defendant's counsel may cross-examine the preparer of the report or call any

witness to guarantee adherence to constitutional requirements. *See* V.R.Cr.P. 32(c)(4); *State v. Ramsay*, 146 Vt. 70, 78, 99 A.2d 15, 20 (1985). The risks inherent in the practice of the announced PSI interview do not require "an extraordinary system of safeguards." *United States v. Ash*, 413 U.S. at 321.

E. There is no right to actual presence of counsel at the interview.

The extension of respondent's argument would result in the presence of defense counsel at the actual interview. Such an outcome is not legally required and could create serious obstacles for the preparer and readers of the sentencing report. Thus, there is no reason to change the extent of the defendant's Sixth Amendment protections, outlined in *Estelle v. Smith*, 451 U.S. at 470-71, relying on *Thornton v. Corcoran*, 407 F.2d 695, 705, 711 (D.C. Cir. 1969) (opinion concurring in part and dissenting in part), where the Court distinguished between a right to counsel *before* the interview and a right to counsel *during* the interview. Attendance of counsel or counsel's investigator, who is not trained in the law, would seriously undermine the exchange of information from respondent during the PSI. *Tippett v. Maryland*, 436 F.2d 1153, 1158 (4th Cir. 1971).

While the Sixth Amendment guarantees the right to rely on counsel as a "medium," *Maine v. Moulton*, —— U.S. ——, ——, 106 S.Ct. 477, 487 (1985), such a right is limited by context. As noted by then Judge Scalia in *United States v. Byers*, 740 F.2d 1104, 1120 (D.C. Cir. 1984), distinguishing *United States v. Wade*, 388 U.S. 218, 237 (1967), there are "substantial countervailing policy considerations [that] have been advanced against the requirement of the presence of counsel." Like a psychiatric interview, the presence of counsel at the PSI interview could seriously inhibit the information gathering function of the PSI, contribute to delays in scheduling interviews, and adversely influence the range of

material relied on by the court in the sentencing decision. Grappling with defense counsel at an interview creates an unnecessary burden for the probation officer [9] and adds little protection for the defendant who has the opportunity to consult with his attorney prior to submitting to the interview.

F. Even if the respondent's right to counsel was violated, such error is harmless.

Conceding, arguendo, that the respondent's Sixth Amendment right to counsel was somehow violated, such error is harmless. This Court has "recognized the necessity for preserving society's interest in the administration of criminal justice." *United States v. Morrison*, 449 U.S. 361, 364 (1980). Thus, "the general rule [is] that remedies should be tailored to the injury suffered from the constitutional violation" and should not unnecessarily infringe on competing interests. *Id.* The respondent's claim is premised on the court's consideration of "damaging admissions." Since these admissions were not barred by the Fifth Amendment, as discussed in Petitioner's Brief,[10] there was no harm caused by the absence of counsel at the PSI interview. The Court need not fashion a remedy in the absence of any real injury.

II. THIS CAUSE IS NOT MOOT.

Respondent was sentenced to serve three consecutive terms totalling eighteen months to three years. J.A. 1, 24. Respondent's sentence was not stayed pending appeal. By the time the state supreme court decided the merits of the appeal, respondent had served his entire sentence and the Department of Corrections had released

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[9] Cf. *Gagnon v. Scarpelli*, 411 U.S. 778, 787-88 (1972) (the introduction of counsel into an informal, factfinding proceeding could prolong the task and create inflated financial costs while at the same time lessening the effectiveness of the process.)

[10] Briefly stated, the admissions were not compelled, the privilege was not asserted, and the penalty was not enhanced.

him.[11] Pursuant to the state court's decision, respondent's sentence was vacated; respondent was entitled to a new sentence before a different judge with a new PSI report. Under these circumstances Cox could receive a sentence different from that originally imposed. Under Vermont law, he could receive the same sentence, a higher sentence, a lower sentence, or even a deferred sentence. Pursuant to 13 V.S.A. § 7041, the court may defer sentencing and place the respondent on probation. "Upon fulfillment of the terms of probation and of the deferred sentence agreement, the court shall *strike the adjudication of guilt and discharge the respondent.*" 13 V.S.A. § 7041(b) (emphasis added).

Thus, the completion of his sentence does not make the existing controversy moot since the respondent could receive a deferred sentence at a resentencing hearing. The possibility of the complete expungement of conviction demonstrates the live nature of this controversy.

CONCLUSION

For the reasons stated above, the decision of the Supreme Court should be reversed.

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[11] At present respondent's whereabouts are unknown. As stated in *United States v. Sharpe*, 470 U.S. 675, 681 n. 2 (1985), the respondent's absence from the jurisdiction does not render this case moot.